FILED
MAY 9 1991
OFFICE OF THE CLERK

No. 90-1746

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ROGER SMITH TROEN, Petitioner

v.

STATE OF OREGON, Respondent

ON WRIT OF CERTIORARI TO
THE SUPREME COURT
OF THE STATE OF OREGON

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

STEPHEN A. HOUZE (OSB #72126)
1215 Security Pacific Plaza
1001 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone: (503) 241-8601
Attorney for Petitioner
Roger Smith Troen

DAVID FROHNMAYER (OSB #71001)
Attorney General
100 Justice Building
Salem, Oregon 97310
Telephone: (503) 378-6002
Attorney for Respondent
State of Oregon

APPENDIX A

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

Case No. 10-87-03558

THE STATE OF OREGON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
ROGER SMITH TROEN,	)	DA Case
	)	No. 87-546
Defendant	)	

THIS MATTER HAVING COME BEFORE THIS COURT on the State's Motion to Limit the Introduction of Evidence pertaining to the defense of Choice of Evils as codified in ORS 161.200; and the State appearing by and through Lane County Assistant District Attorney Frank R. Papagni, Jr., and the defendant appearing personally and by and through his attorney, Stephen A. Houze; and the Court having considered the memoranda

filed by the parties, evidence in the form of testimony, exhibits and representation, and the arguments of the parties; and being fully advised;

IT IS HEREBY THE FINDINGS OF THIS COURT THAT:

The representations and evidence offered by the parties are accepted as true.

A trial court may exercise its discretion under ORS 135.037 to conduct a pretrial omnibus hearing in order to rule on the State's Motion to Limit the Introduction of Evidence regarding the defense Choice of Evils. State v., Hund, 76 Or App 89, 708 P2d 621 (1985), pet. for review den., 300 Or 477 (1986); State v. Whisman, 33 Or App 147, 575 P2d 1005 (1978).

The defendant's offer of proof was considered in its entirety by this Court; and the State's arguments based on Smith v. White, 213 Or 425, 435, P2d (1962); State v. Howard, 49 Or App 391, 619 P2d 943 (1980) are rejected.

The legal issue presented was whether the evidence the defendant was allowed to present in his offer of proof was relevant to prove the Choice of Evils defense. OEC 401, ORS 40.150; ORS 161.200.

Evidence presented by the defendant's offer of proof was irrelevant and inadmissible in a judicial forum, and would have been more appropriate presented in legislative or executive forums.

The defendant committed these crimes because he disagreed with

policies and activities pertaining to animal research at the University or Oregon. The facts seem to fit precisely within the exclusion of ORS 161.200(2). As a matter of law, a person in our society cannot commit crimes only because that person disagrees with what is lawfully taking place in some other part of our society. State v. Hund, supra. See also United States v. Dorrell, 758 F2 427 (9th Cir. 1985). Therefore, pursuant to ORS 161.200(2), the defendant is not entitled to rely upon a Choice of Evils defense.

There is no doubt as to the good faith of the defendant's concern for animal's welfare; but the defendant's offer of proof contains no evidence that the animals were in any better condition after they were stolen or

"liberated" from their owners. The defendant's complete failure to provide any evidence showing that his criminal actions actually prevented a threatened greater harm, both logically and legally, prevents the introduction of a Choice of Evils defense before the trier of fact.

The defendant further failed to offer any evidence legally justifying the extensive damage done to the facilities and equipment at the University of Oregon during the commission of the Burglary. Therefore, as pertaining to Count I, CONSPIRACY TO COMMIT BURGLARY IN THE SECOND DEGREE and Count II, BURGLARY IN THE SECOND DEGREE, there is no evidentiary basis to allow the defendant to present a Choice of Evils defense.

The defendant has also failed to offer any relevant evidence which would satisfy any of the statutory requirements set forth in ORS 161.200. Specifically, the defendant's offer of proof failed to present any evidence that: (1) the defendant's conduct was necessary to avoid the threatened injury; (1) the threatened injury was imminent; and (3) it was reasonable for the defendant to believe that the need to avoid injury was greater than the need to avoid the injury which the statute sought to prevent. State v. Matthews, 30 Or App 1133, 1136, 569 P2d 662 (1977).

Further, the proffered evidence is irrelevant and inadmissible as proof of the defendant's "state of mind" as

pertaining to a defense of Choice of Evils.

This Court accepts, adopts and incorporates the factual representations, arguments and briefs presented by the State as part of its findings, except as previously stated in this Order.

IT IS THEREFORE THE ORDER OF THIS COURT that none of the evidence submitted by the defendant in his offer of proof is admissible before the trier of the fact in support of a defense of Choice of Evils. The State's Motion to Limit the Introduction of such evidence is allowed.

DATED this 4th day of February, 1988.

/s/ Edwin E. Allen
EDWIN E. ALLEN
CIRCUIT COURT JUDGE

Submitted by:
Frank R. Papagni, Jr., OSB #76268
Assistant District Attorney

APPENDIX B

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

THE STATE OF OREGON, Plaintiff,	Case No. 10-87-03558
vs.	SENTENCE AND ORDER OF PROBATION
ROGER SMITH TROEN, Defendant.	

NOW on the 23rd day of March, 1988, this cause came on to be heard, the State of Oregon being represented by Frank R. Papagni, Assistant District Attorney for Lane County, Oregon and the defendant, Roger Smith Troen, appearing in person, and being represented by his attorney, Stephen A. Houze, said defendant having been indicted by the Lane County Grand Jury and having been duly arraigned upon charges of CONSPIRACY TO COMMIT BURGLARY IN THE

SECOND DEGREE (Count I); BURGLARY IN THE SECOND DEGREE (Count II); and THEFT IN THE FIRST DEGREE (Count III) and having been duly tried and convicted of said crimes before the Court in the above entitled court and cause on the 21st day of January, 1988, and this being the time fixed for imposing sentence herein, and the court being fully advised,

THE COURT FINDS, that for the purpose of imposing sentence herein, that the crimes charged in Count I and Count III of the Indictment (CONSPIRACY TO COMMIT BURGLARY IN THE SECOND DEGREE AND THEFT IN THE FIRST DEGREE) merges with Count II of the Indictment, "BURGLARY IN THE SECOND DEGREE", and

PURSUANT TO CHAPTER 725 Oregon Laws, 1983, the defendant, Roger Smith Troen, is assessed the sum of $50; and

IT IS CONSIDERED, ORDERED, AND ADJUDGED, that the defendant, Roger Smith Troen, be and he is hereby sentenced to pay restitution in the sum of $34,912.96; and

IT IS FURTHER ORDERED, that the defendant, Roger Smith Troen, be and he is hereby placed on probation to the Corrections Division for a period of five (5) years from the date hereof, upon and subject to the General Conditions provided by ORS 137.540, which are attached hereto and 2incorporated herein, and upon the following Special Conditions: 7A, 7B, 12, 14A, 14B, 14D and 14E of the Conditions of Supervision of the

Corrections Division, State of Oregon, which is attached hereto and incorporated herein.

DATED and signed this 23rd day of March, 1988.

/s/ Edwin E. Allen
EDWIN E. ALLEN
CIRCUIT JUDGE

COURT REPORTER:

Judy Roberts

CORRECTIONS DIVISION
FIELD SERVICES - PROBATION
CONDITIONS OF SUPERVISION

County LANE DOCKET# 10-87-03558

I. GENERAL:

The Court may place the defendant on probation, which shall be subject to the following General Conditions unless specifically deleted by the Court (ORS 137.540). The Probationer shall:

1. Remain under the supervision and control of the Probation Department.
2. Abide by the direction of the Probation Department and its representatives.
3. Promptly and truthfully answer all reasonable inquiries of the Probation Officer relating to probation performance.

4. Truthfully report monthly at times and in the manner specified by the Probation Department or its representative.

5. Remain in the State of Oregon until written permission to leave is granted by the Probation Department or its representatives.

6. Find and maintain gainful full-time employment, approved schooling, or a full-time combination of both. Any waiver of this requirement must be based on finding by the Court stating the reasons for the waiver.

7. Change neither employment nor residence without promptly informing the Probation Department or its representatives.

8. Permit the Probation Officer to visit the probationer or the probationer's residence or worksite.

9. Submit to fingerprinting or photographing, or both, when requested by the Probation Department for supervision purposes.

10. Obey all laws, municipal, county, state and federal. (The Federal Gun Law of 1968 prohibits any person convicted of a crime punishable as a felony the use or possession of a firearm.)

11. Pay fines, costs including probation costs, attorney fees or restitution or any combination thereof ordered by the Court on a

schedule of payments determined by the Court.

II. SPECIAL CONDITIONS

In addition, the following indicated Special Conditions are imposed for the protection of the public or reformation of the offender. The undersigned Probationer shall:

_____ 1. Be confined to the county jail for a period not to exceed _____ _____.

_____ 2. Submit to polygraph examination by qualified polygraph examiner designated by the Court or Probation Officer under terms and conditions set by the Court.

_____ 3. Enroll, participate and successfully complete_____

_____

(designated residential treatment programs for drug, alcohol, or mental health.)

_____ 4.A Abstain from the use of intoxicants.

_____ 4.B Not use intoxicants to excess. (The excessive use of intoxicants is understood to mean that the effects disrupt or interfere with domestic life, employment or proper community conduct.)

_____ 5. Submit to random urinalysis at the direction of Probation Officer.

_____ 6. Refrain from knowingly associating with persons who use or possess controlled substances illegally, or from requesting places where such substances are kept or sold.

__X__ 7. Refrain from knowingly associating with:

__X__ A. Codefendants or crime partners.

__X__ B. Persons known to be engaged in criminal activities.

_____ C. Persons under age ___ except under specific circumstances specified in writing by the Court or Probation Officer.

_____ D. Other designated person_____

_____

_____ 8. Undergo medical, psychological or therapy treatment.

_____ 9. Take Antabuse, if medically approved.

_____10. Submit to breath test or blood test to determine blood alcohol content upon request of Probation Officer having reasonable grounds to believe the results would disclose evidence of probation violation. (This condition may be set when it is reasonably related to the mature of the offense or treatment of the offender.)

_____11. Neither own, possess nor control any firearm or any other specified weapon:_____

__X__12. Submit person, residence, vehicle, and property to search by a Probation Officer, having reasonable grounds to believe such search will disclose evidence of probation violation. (This condition may be set when it is reasonably related to the nature of the offense or treatment of the offender.)

_____13. Report to_____ (Any state or local mental health facility) for evaluation, and if medical, psychiatric or psychological treatment is

recommended, cooperate with and accept the treatment of the facility.

X 14. Other SpecialConditions:

A. that the defendant shall pay the restitution he has been sentenced to pay herein the sum of $34,912.96 at the rate of not less than $150 per month. First payment shall be paid on or before May 1, 1988 and a like sum of $150 shall be paid on or before the 1st day of each successive month thereafter until total restitution shall be paid. To be paid to the Court Clerk; shall be fully paid on or before 5 years from the date hereof, who shall pay the same over to the University of Oregon.

B. That the defendant shall pay a probation supervision fee of $15 per month as directed by his probation officer.

C. That the defendant shall serve 90 days home detention, utilizing the ankle bracelet monitoring program and agree to the program rules, including paying any fees required, as established by the Corrections Division.

D. That the defendant shall perform Community Service of 250 hours; at not less than 50 hours per year.

E. Defendant shall not associate with the Animal Liberation Front or/any of its members. Failure to abide by all General and Special

Conditions imposed by the Court and supervised by the Probation Department and its representatives may result in arrest and revocation of probation and will result in notification of the violation to the sentencing Court. The Court may at any time modify the conditions of Probation.

March 23, 1988 /s/ Hon. Edward E. Allen
Date Judge Hon. Edwin E. Allen

I understand and accept the conditions of Probation under which I have been released by the sentencing Court. I agree to abide by and conform to them and fully understand my failure to do so may result in the revocation of my probation by the Court.

_____ _____
Date Signature of Person Under Probation

_____ _____
Reviewed with Supervising Officer Date

APPENDIX C

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

THE STATE OR OREGON,	)	
	)	Case No. 10 87
Plaintiff,	)	03558
	)	
vs.	)	ORDER MODIFYING
	)	SENTENCE AND
ROGER SMITH TROEN,	)	ORDER OF
	)	PROBATION
Defendant.	)	

THIS MATTER having come before the Court this date on the Court's own Motion and upon the recommendation of Nikki Finley, Parole and Probation Officer, Corrections Division, State of Oregon; and

IT APPEARING TO THE COURT that one of the Defendant's terms of probation contained in the Sentence and Order of Probation made and entered herein on the 23rd day of March, 1988, is that, "Defendant shall not associate with the Animal Liberation Front or any of its

members."; and the court having been advised by Nikki Finley, Defendant's Probation Officer, that the Animal Liberation Front is an underground organization and that the members are unknown which makes this condition of probation unenforceable; now, therefore,

it is hereby

ORDERED that the condition of probation contained in the Sentence and Order of Probation made and entered herein on the 23rd day of March, 1988, wherein Defendent "shall not associate with the Animal Liberation Front or any of its members" be and the same hereby is deleted from the Sentence and order of Probation heretofore referred to; and it is further

ORDERED that said Sentence and Order of Probation made and entered herein on the 23rd day of March, 1988 heretofore referred to, shall remain in full force and effect except as specifically modified herein.

DATED and signed this 15th day of January, 1991.

/s/ Edwin E. Allen
EDWIN E. ALLEN
CIRCUIT JUDGE

APPENDIX D

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,

Respondent,

v.

ROGER SMITH TROEN,

Appellant.

(10-87-03558; CA A48068)

Appeal from Circuit Court, Lane County.

Edwin E. Allen, Judge.

Argued and submitted April 17, 1989.

Stephen A. Houze, Portland, argued the cause for appellant. With him on the brief was Birkland & Houze, Portland.

Janet Klapstein, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

Before Graber, Presiding Judge, and Riggs and Edmonds, Judges.

GRABER, P.J.
Affirmed.

5585N FILED: February 14, 1990

DESIGNATION OF PREVAILING PARTY AND ALLOWANCE OF COSTS

Case Name: State v. Troen

Appellate case number: CA A48068

Trial court or agency case number: 10-87-03558 (C)

Prevailing party or parties: Respondent.

[ ] No costs allowed

[ ] Costs allowed to the prevailing party or parties, payable by:

In a criminal, post-conviction relief, habeas corpus, juvenile or other case in which a party may be represented by appointed counsel entitled to compensation under ORS 138.500, if the prevailing party is a private party and represented by retained counsel or appeared pro se, the prevailing party is allowed costs.

* * * * * * * * * * *

FINAL ORDER*

IT IS ORDERED that on appeal or judicial review the prevailing party or parties recover from

costs and disbursements taxed at $_____, and attorney fees in the amount of $_____ (ORAP 11.03, 11.05, and 11.10.)

IT IS FURTHER ORDERED that judgment be entered in favor of the Judicial Department and against

in the amount of $_____ for filing fees not waived and unpaid at the time of entry of the final written disposition of this case. ORS 21.605.

Date Supreme Court denied review: Dec. 4, 1990

DATED: Jan. 9, 1991 COURT OF APPEALS
(seal)

*This section will be completed when the appellate judgment is prepared. The Records Division of the Office of the State Court Administrator will prepare the appellate judgment, enter it in the appellate register, and mail copies to the parties within the time and in the manner specified in ORAP 11.03(3). See also ORS 19.190(1).

GRABER, P.J.

Defendant, an animal rights activist, appeals from convictions[1] for crimes arising from a break-in at a University of Oregon research facility and the theft of laboratory animals. He assigns as error the allowance of the state's pretrial motion to limit the evidence that he proposed to introduce in support of a "choice of evils" defense. ORS 161.200.[2] We affirm.

Before trial, the state filed a motion that sought to preclude defendant from offering evidence on his choice of evils defense. In the pretrial hearing, the trial court required defendant to present his evidence. He argues that the trial court (1) abused its discretion in requiring him to present his evidence before trial, (2) erred by not restricting its rulings regarding the proffered

evidence to relevancy and other general grounds of admissibility, and (3) usurped defendant's right to have a jury hear his defense, because it rejected the defense on its merits.

A motion to limit evidence may be considered in a pretrial omnibus hearing under ORS 135.037(3). State v. Marbet, 32 Or App 67, 573 P2d 736 (1978). We rejected an argument similar to defendant's in State v. Whisman, 33 Or App 147, 575 P2d 1005 (1978). See also State v. Clowes, ___ Or App ___, ___ P2d ____ (January 24, 1990). Generally, a trial court should make a pretrial ruling on the admissibility of evidence only if the evidence carries an unusual potential for prejudice. State v. Browder, 69 Or App 564, 567, 687 P2d 168, rev den 298 Or 172 (1984). Here, the proffered evidence included, in defendant's words,

> "graphic photographic evidence of research practices and abuses, [and] graphic video-taped documentaries of other similar research practices and animal abuses * * *."

The nature of the evidence was such that the trial court did not abuse its discretion in ruling on its admissibility before trial.

Defendant argues that the pretrial ruling excluding the evidence abrogated his rights under Article I, section 11, and the Fourteenth Amendment to present a defense. The short answer is that the right to present a defense is subject to the requirements that the defense be one that the law recognizes and that it be proven by admissible evidence. See Washington v. Texas, 388 US 14, 23, 87 S Ct 1920, 18 L Ed 2d 1019 (1967); see also State v. Douglas, 292 Or 516, 533 n 17, 641 P2d 561 (1982) (Lent, J., specially concurring: "The

defendant's right to present a defense is subject to legal requirements, such as that evidence must be relevant and material"); State v. Holterman, 69 Or App 509, 687 P2d 1097, rev den 298 Or 172 (1984).

Defendant's second argument is that the trial court, in its pretrial ruling, went beyond determining a minimal threshold of relevancy and weighed the sufficiency of the evidence. In order to present a jury question regarding the choice of evils defense, a defendant must offer evidence that would be sufficient for a jury to find that: (1) the defendant's conduct was necessary to avoid a threatened injury; (2) the threatened injury was imminent; and (3) it was reasonable for the defendant to believe that the need to avoid that injury was greater than the need to avoid the injury that the charging statute seeks to prevent. State v. Matthews, 30 Or App

1133, 1136, 569 P2d 662 (1977). When a defendant raises the choice of evils defense, the trial judge must determine whether the evidence satisfies those requirements before the court can submit the issue to a jury. If there is evidence from which the jury could find that each requirement has been met, then the court must submit the defense. It is for the jury to determine the weight of the evidence and to decide whether the defense has been established. Contrary to defendant's argument, the trial court correctly understood its role.

Next, defendant asserts that the court erred in failing to submit the defense, because the evidence that he offered was sufficient to raise a jury question. He contends that his evidence showed that laboratory animals were being subjected to cruel and inhumane testing procedures and

that it was therefore necessary for him and his accomplices to break into the laboratories in order to protect the animals.

The decisive question, however, is whether defendant's use of the defense here would be "inconsistent * * * with some other provision of law." State v. Clowes, supra, ____ Or App at _____. Extensive federal regulations govern the treatment of animals used in the experiments that the laboratories were performing. See 9 CFR § 3.1 et seq. For this purpose, regulations authorizing conduct have the same effect as statutes authorizing conduct. Although defendant alleges in his brief that the laboratory that he helped to raid was violating several federal regulations, he does not point to any evidence in the record that would support those allegations. Accordingly, federal law

expressly allows what the victim of the crime was doing, so defendant may not offer a choice of evils defense when he interfered with that activity because of his belief that what the laboratory was doing is morally wrong.

Finally, defendant argues that the proffered evidence was admissible as evidence of his motive in participating in the burglary and theft. He relies on State v. Miller, 137 Or 218, 2 P2d 8 (1931), for the proposition that, although proof of motive is not ordinarily essential, evidence showing a motive or its absence is always admissible. In the trial court, he argued that his evidence was admissible to show his state of mind or what he intended. For the purposes of deciding this issue, we assume that defendant's concepts of "state of mind" and "motive" are synonymous.

Defendant was charged with "intentionally" conspiring to commit the crime of burglary and "knowingly" committing the crimes of burglary and theft. ORS 161.085 provides these definitions:

> "(7) 'Intentionally' or 'with intent,' when used with respect to a result or to conduct described by a statute defining an offense, means that a person acts with a conscious objective to cause the result or to engage in the conduct so described.
>
> "(8) 'Knowingly' or 'with knowledge,' when used with respect to conduct or to a circumstance described by a statute defining an offense, means that a person acts with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists."

OEC 401 defines "relevant evidence" as

> "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Defendant's proffered evidence was not relevant to the issue of whether he acted "with intent" to conspire to commit the crime of burglary or "knowingly" in committing the crimes of burglary and theft. Defendant's motive, that is, why he did what he did, is immaterial to the allegations that he acted with a conscious objective to commit burglary or with an awareness that his conduct constituted burglary or theft. In State v. Miller, supra, the reason why the defendant, a police officer, released those whom he had arrested was essential to his defense to a charge that he had done so as the result of a bribe. In this case, in contrast, why defendant did what he did has nothing to do with whether he acted intentionally or knowingly. The issue was whether defendant acted with a particular state of mind, not why he had that mental state. The

proffered evidence would not tend to show that defendant did not know what he did or intend to do it. The court, therefore, did not err in excluding it.

Affirmed.

FOOTNOTES

1

Defendant was convicted of theft in the first degree, burglary in the second degree, and conspiracy to commit burglary in the second degree. ORS 164.055; ORS 164.215; ORS 161.450.

2

ORS 161.200 provides:

> "(1) Unless inconsistent with other provisions of chapter 743, Oregon Laws 1971, defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when:
>
> "(a) That conduct is necessary as an emergency measure to avoid an imminent public or private injury; and
>
> "(b) The threatened injury is of such gravity that, according to

ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

"(2) The necessity and justifiability of conduct under subsection (1) of this section shall not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder."

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF OREGON

OREGON STATE OF Respondent/ Respondent	)	
	)	ORDER DENYING
	)	REVIEW
v.	)	
	)	CA A48068
TROEN ROGER SMITH	)	SC S37075
Appellant Petitioner	)	
	)	

The Court has considered the petition for review and ORDERS that it be denied.

DATE: December 4, 1990

/s/ Edwin J. Peterson
EDWIN J. PETERSON
CHIEF JUSTICE

Graber, J., not participating

COPIES TO:

KLAPSTEIN JANET A	Attorney for Respondent/ Respondent
HOUZE STEPHEN A	Attorney for Appellant Petitioner

APPENDIX F

IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON
Respondent on Review,
v.
BRIAN WOODBRIDGE CLOWES
Petitioner on Review.
(DA 372447-8806; CA A50128 (Control);
SC S36922)

STATE OF OREGON,
Respondent on Review,
v.
JUDY LOIS HAGER,
Petitioner on Review.
(DA 372448-8806; CA A50129; SC S36946)

STATE OF OREGON,
Respondent on Review,
v.
MICHAEL JAMES KINSEY,
Petitioner on Review.
(DA 372450-8806; CA A50132; SC S36933)

STATE OF OREGON,
Respondent on Review,
v.
RACHEL A. WOLCOTT,
Petitioner on Review.
(DA 372446-8806; CA A50136; SC S36946)
(Cases Consolidated)

On review from the Court of Appeals*

Argued and submitted June 6, 1990.

Richard L. Stradley, Hillsboro, argued the cause and filed the petition for petitioner on review Brian Woodbridge Clowes.

---

*Appeal from Multnomah County District Court, William J. Keys, Judge, 100 Or App 266, 785 P2d 1071 (1990)

Norman L. Lindstedt, Lindstedt & Buono, P.C., Portland, argued the cause and filed the petition for petitioners on review Judy Lois Hager and Rachel A. Wolcott.

William E. McCann, Tillamook, argued the cause and filed the petition for petitioner on review Michael James Kinsey.

Janet Klapstein, Assistant Attorney General, Salem, argued the cause for respondent on review. With her on the response brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

Melanie E. Mansell, Sheridan, filed a brief amici curiae on behalf of The Rutherford Institute, Charlottesville, Virginia.

Before Peterson, Chief Justice, and Carson, Gillette, Van Hoomissen, Fadeley, and Unis, Justices.

UNIS. J.

The decision of the Court of Appeals is affirmed. The judgment of the Multnomah County District Court is affirmed.

UNIS, J.

The question presented in this case is whether the statutory defense of choice of evils, ORS 161.200,[1] is available to anti-

---

[1]ORS 161.200 provides:

"(1) Unless inconsistent with other provisions of chapter 743, Oregon Laws 1971, defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when:

"(a) That conduct is necessary as an emergency measure to avoid an imminent public or private injury; and

"(b) The threatened injury is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

"(2) The necessity and justifiability of conduct under subsection (1) of this section shall not rest upon considerations pertaining only to the morality and advisability of the statute, either in

abortionists who were charged with criminal trespass in the second degree, ORS 164.245,[2] after they had entered the premises of an abortion clinic, attempted to prevent patients who were in the first trimester of pregnancy from having abortions, blocked access to the clinic by sitting in the doorways, and refused to leave when asked. We hold as a matter of law that the defendants are not entitled to assert the choice of evils defense.

Lovejoy Surgicenter (the clinic) is a

---

[1]cont.
its general application or with respect to its application to a particular class of cases arising thereunder."

[2]ORS 164.245 provides:

"(1) A person commits the crime of criminal trespass in the second degree if the person enters or remains unlawfully in or upon premises.

"(2) Criminal trespass in the second degree is a Class C misdemeanor."

clinic that performs abortions. On June 18, 1988, defendants were arrested and charged with criminal trespass in the second degree for the conduct described above. Defendants entered not guilty pleas, requested jury trials, and gave timely notice of their intent to rely on the statutory defense of choice of evils, ORS 161.200.

The state filed a motion *in limine* to exclude any evidence of the defense. At a pretrial hearing, defendants made an offer of proof on the evidence it sought to present to the jury. Defendants contended that their violation of the criminal trespass law was an emergency measure that was necessary to avoid the imminent death of unborn children. The evidence at the pretrial hearing showed, *inter alia*, that 19 abortions were scheduled at the clinic on June 18, 1988, and that all of the

patients were within the first trimester, ranging from 6 to 11 weeks of gestation.[3] There was evidence offered by defendants in the form of expert opinion testimony that life begins at the time of conception. There also was evidence to support defendants' assertion that each abortion involved the taking of a human life. There was no evidence that the women who were to have abortions on the day of defendants' trespass were doing so other than voluntarily or that those who were to perform abortions were compelled to participate. Defendants do not assert that the clinic was unlicensed or otherwise failed to comply with any applicable law.

The trial court found that defendants

---

[3]Also scheduled at the clinic that day was one second trimester pregnancy at 22 weeks of gestation, in which the patient had AIDS. The trial court elected not to rely on the AIDS case as a basis for its decision. We do not consider it here.

had proffered sufficient evidence on all the elements of the choice of evils defense, generally, to submit it to the jury. Nevertheless, the trial court granted the state's motion to exclude evidence of the defense on the ground that to admit such evidence would be inconsistent with Roe v. Wade, 410 US 113, 93 S Ct 705, 35 LEd2d 147 (1973).[4] Because of the trial court's ruling, defendants withdrew their request for a jury trial and proceeded to a court trial on stipulated

---

[4]Although the record is not entirely clear, it appears that the trial court concluded that allowing defendants to avail themselves of the statutory choice of evils defense would constitute state action, by which the state would be sanctioning defendants' interference with the pregnant women's federal constitutional privacy rights as recognized in Roe v. Wade, 410 US 113, 93 S Ct 705, 35 L Ed2d 147 (1973), and subsequent cases.

facts. The trial court found defendants guilty.[5]

Defendants appealed from the resulting judgment. The Court of Appeals, in an in banc decision, affirmed. State v. Clowes, 100 Or App 266, 785 P2d 1071 (1990). A majority of that court held:

> "The present state of Oregon law is that a woman's decision to have an abortion is left to her and her physician. See ORS 435.435 et seq. To permit defendants to prevent or interfere with that freedom of choice would be inconsistent with the 'other provisions of [Oregon law.' It is clear from the legislative action that no interference with a woman's choice to have an abortion is to be tolerated, and, therefore, the [choice of evils] defense is unavailable. ORS 161.200(1)."

---

[5]Defendants were charged and tried separately. As a matter of judicial economy, the trial court allowed each defendant to join the legal and factual assertions of the other defendants in the pretrial proceeding. In this court, as in the Court of Appeals, the cases of the named defendants are consolidated for argument and decision.

Id. at 274. Judge Graber, in a specially concurring opinion, agreed that the choice of evils defense was not available to defendants, but for different reasons. She "would hold as a matter of law * * * that an abortion is not [a 'public or private injury' as those terms have meaning in the context of ORS 161.200(1)(a)]." Id. at 276. Judge Graber also stated that "[d]efendants base their choice of evils defense on the assertion that the criminal trespass statutes should not apply to their protest on moral grounds, against abortion[,]" and "[t]hat is exactly the kind of claim that ORS 161.200(2) forecloses." Id. at 278.

We allowed review to decide whether the choice of evils defense, sometimes referred to as the defense of necessity, is

available to defendants under the facts of this case.

Defendants first argue that "the trial court abuse[d] its discretion in relation to the motion in limine by requiring [them] to present the entirety of * * * [their choice of evils defense] evidence to the court in a pretrial offer of proof." We disagree.

Evidence which is not relevant is not admissible. OEC 402. The standard to be used in determining whether proffered evidence is relevant is supplied by OEC 401. That rule provides:

> "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Under OEC 401's relevancy standard, facts must be "of consequence to the determination of the action" (i.e.,

"material")[6] for them to be relevant. Whether or not facts are of consequence is determined not by the rules of evidence but by the pleadings and the substantive law. McCormick on Evidence 541, § 185 (3rd ed 1984). If under the substantive law the choice of evils defense is not available to defendants in this case, then evidence in support of that defense would not be "of consequence to the determination of the action" and, therefore, would be irrelevant, OEC 401, and inadmissible, OEC 402. The trial judge must decide, under OEC 104(1), whether the proffered evidence satisfies the minimum threshold of relevancy required by OEC 401, i.e., whether the proffered evidence (1) has any tendency to prove or disprove a fact (2)

---

[6]OEC 401 subsumes the concept of materiality in the definition of relevance.

that is "of consequence to the determination of the action."

In State v. Foster, 296 Or 174, 183, 674 P2d 587 (1983), we expressly approved the use of a pretrial motion in limine to obtain a ruling on evidence before the evidence is sought to be introduced. See State v. McClure, 298 Or 336, 340, 692 P2d 579 (1984) (to the same effect). We recognized that one of the purposes of a motion in limine is to insulate the jury from exposure to harmful inadmissible evidence. State v. Foster, supra, 296 Or at 183. In this case, the trial court was well within its discretion when it required defendants to present evidence of their defense of choice of evils in a pretrial offer of proof.[7]

---

[7]Requiring evidence in the form of an offer of proof may serve another purpose. In this case, the trial court was called upon to determine the meaning of a statute,

7 cont.
ORS 161.200, and to decide whether under that law defendants were entitled to introduce evidence in support of the defense of choice of evils. An offer of proof is an appropriate vehicle for supplying the court with facts and information to help it perform that task. Facts utilized by a court to "help [it] to determine the context of the law and policy and to exercise its judgment or discretion in determining what course of action to take" have been described as judicial notice of legislative facts. See Davis, Judicial Notice, 55 Colum L Rev 945, 952 (1955); Strong, Evidence, § 3.18 (Oregon CLE 1986); see also Chartrand v. Coos Bay Tavern, Inc., 298 Or 689, 693, 696 P2d 513 (1985).

> "[T]he term 'legislative' facts is not restricted to facts developed and relied upon by the legislature in the process of formulating statutory law, but extends to all facts utilized by the courts in determining what the law, either statutory or decisional, is or should be."

Cleary, Strong, Broun and Mosteller, Evidence, Cases and Materials 349 (4th ed 1988). Judicial notice of legislative facts is not governed by the provisions of OEC 201, and the limitations and standards of OEC 201 do not control notice of legislative facts. State v. Brown, 297 Or 404, 420, n 7, 687 P2d 751 (1984). We have recognized the distinctive nature of legislative facts in several cases. See,

Moreover, a review of the legislative history relating to the enactment of ORS 161.200 nowhere demonstrates that the trial judge may not determine in the first instance whether a defendant's evidence relating to the choice of evils defense is admissible. Rather, the history evidences a legislative intent to give the trial court discretion to hold a pretrial hearing to rule on the applicability of the defense. See Minutes, Criminal Law Revision Commission, November 7, 1969, pp 25-30, See also Commentary, Proposed Oregon Criminal Code 20, § 20 (1970).

---

7 cont.
e.g., Chartrand v. Coos Bay Tavern, Inc., supra, 298 Or at 693-94 (court takes judicial notice of legislative facts when it takes notice of facts for the purpose of determining what the common law of this jurisdiction is or ought to be); State v. Brown, supra, 297 Or at 417, n 4 (court specifically points out facts judicially noticed, i.e., the inaccuracies of polygraph examination, were noticed to determine a rule of law regarding inadmissibility of polygraph results).

Defendants next contend that the trial court erred as a matter of law in excluding evidence in support of their choice of evils defense, ORS 161.200, thereby precluding them from arguing their only putative defense to the criminal trespass charge to the jury.

Before addressing that contention and examining ORS 161.200, which defines the contours of the choice of evils defense, a brief review of the recent history of Oregon legislation concerning abortion is helpful to an understanding of the legal issues presented in this case.

In 1969, the Oregon legislature enacted former ORS 435.405 et seq. Those statutes, which were based on Model Penal Code Section 230.3 (1962), see Comment, Abortion, Oregon Style, 49 Or L Rev 302 (1970), allowed an abortion when (1) there was "substantial risk that continuance of

the pregnancy [would] greatly impair the physical or mental health of the mother,"[8] (2) "[t]he child would be born with serious physical or mental defect,"[9] or (3) "[t]he pregnancy resulted from felonious intercourse."[10] After the 150th day, abortion was permitted only when "[t]he life of the pregnant woman [was] in imminent danger."[11] Under Oregon law, abortions could be performed only by licensed physicians in licensed hospitals.[12] Except in emergency cases,

---

[8]Former ORS 435.415(1)(a)(repealed by Or Laws 1983, ch 470, § 1).

[9]Former ORS 435.415(1)(b)(repealed by Or Laws 1983, ch 470, § 1).

[10]Former ORS 435.415(1)(c)(repealed by Or Laws 1983, ch 470 § 1).

[11]Former ORS 435.445(1)(repealed by Or Laws 1983, ch 470, § 1).

[12]Former ORS 435.415(3); 435.405(2) and (3) (repealed by Or Laws 1983, ch 470, § 1).

two other physicians had to certify in writing the circumstances justifying an abortion.[13] There were record keeping and reporting requirements.[14] Assistance in self-abortion was unlawful.[15] With some exceptions, it was a crime to perform or aid in an abortion.[16] A doctor's license could be suspended or revoked for performing an abortion not permitted by Oregon law.[17] The limitations on abortion did not apply to "the prescription, administration, or distribution of drugs or

---

[13]Former ORS 435.425(1); 435.445(1) (repealed by Or Laws 1983, ch 470, § 1).

[14]Former ORS 435.425; 435.435(2); 435.445(2); 435.495(1) (repealed by Or Laws 1983, ch 470, § 1).

[15]Former ORS 435.455(2) (repealed by Or Laws 1983, ch 470, § 1).

[16]Former ORS 435.455 (repealed by Or Laws 1983, ch 470, § 1).

[17]ORS 677.190 (amended by Or Laws 1983, ch 470, § 4).

other substances for avoiding pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at, or immediately after fertilization."[18] Oregon law required the written consent of the pregnant woman, or the written consent of a parent if she was an unmarried minor, or the written consent of her husband if she was married and living with her spouse.[19] Current Oregon law recognizes the right of an individual to refuse to participate in an abortion[20] and the right of private hospitals to deny use of their facilities for such purpose.[21]

In 1973, the Supreme Court of the

---

[18]Former ORS 435.465 (repealed by Or Laws 1983, ch 470, § 1).

[19]Former ORS 435.435 (repealed by Or Laws 1983, ch 470, § 1).

[20]ORS 435.485.

[21]ORS 435.475.

United States handed down its landmark decisions in Roe v. Wade, supra, and Doe v. Bolton, 410 US 179, 93 S Ct 739, 35 L Ed 2d 201 (1973). In those opinions, the Supreme Court held that during the first trimester of pregnancy, the right of the woman to terminate her pregnancy is absolute. In the second trimester, a state may choose to regulate abortion procedures in ways that are reasonably related to maternal health. In the final trimester, the state may regulate abortion for the preservation of the life of the fetus. In Doe v. Bolton, supra, the Supreme Court struck down a Georgia statute that limited abortions in a manner similar in many respects to those provisions in former ORS Chapter 435, discussed above.

In 1973, a special three-judge panel of the United States District Court for the District of Oregon in Benson v. Johnson,

No. 70-226, slip op at ___ (DC Or Feb. ___, 1973), declared portions of former ORS Chapter 435 unconstitutional.[22] Following that decision, the Oregon Attorney General issued a letter of advice explaining which statutory provisions specifically were declared unconstitutional by the Benson court and which statutory provisions were rendered meaningless or affected by the decision. See Oregon Attorney General Letters of Advice (March 27, 1973).

A decade later, the Oregon Legislature enacted 1983 Oregon Laws, Chapter 470. That legislation repealed those Oregon

---

[22]The sections declared unconstitutional were former ORS 435.415 (limitation of place and circumstances of abortion), former ORS 435.425 (physician certification and 150-day limitation), former ORS 435.435(1) (spousal or guardian consent), former ORS 435.425(2) and former ORS 435.435(2) (record keeping and reporting requirements), and former ORS 435.455 (criminal penalties for unauthorized abortions).

statutes that might inhibit or restrict a woman in obtaining an abortion, including those sections declared unconstitutional in Benson v. Johnson, supra. Only right of conscience provisions and certain record keeping requirements now remain on the books.[23] In addition, the Oregon legislature enacted a law that assumes abortions will be performed. No hospital operated by the state or a political subdivision may adopt a policy of excluding or denying admission to a woman seeking termination of pregnancy. ORS 435.475(3). At the time of defendants' trespasses, the Health Division by rule had established criteria for licensing termination of pregnancy hospitals. Former OAR 33-73-200 to OAR 33-73-255. Facilities where abortions are performed, for example, were

---

[23]See ORS 435.475; 435.485; 435.496.

subject to state regulations as to what medical equipment must be available, depending on the stage at which the termination of pregnancy is to be performed. Id. Currently, OAR 333-71-000(1)(b)(A) and (1)(c)(A) establish procedures for outpatient surgery involving termination of pregnancy.

The above legislative history makes it clear that current Oregon law provides that the decision whether to terminate a pregnancy is left to the woman and her physician.[24]

---

[24]Because, as previously discussed, Oregon does not prohibit voluntary and properly performed abortions, "the conclusion that those involved had a right to seek and perform the contemplated abortions does not depend on the [United States] Supreme Court's holding in Roe v. Wade, supra. If Oregon law did prohibit abortions, Roe and its progeny would be relevant to the extent that they would render such a law invalid." State v. Clowes, 100 Or App 266, 276, n 5, 785 P2d 1071 (1990) (Graber, J., specially concurring).

Let us now turn to ORS 161.200.[25] To determine whether the choice of evils defense set forth in ORS 161.200 is available to defendants in this case, we must first decide whether to permit its use by them would, in the words of subsection (1), be "inconsistent * * * with some other provision of law," as that phrase has meaning in the context of ORS 161.200(1). If allowing the defense would be "inconsistent with some other provision of law," it may not be asserted. If not, then the availability of the defense is dependent upon whether the other preconditions to its use set forth in ORS 161.200 are satisfied.

The phrase "inconsistent with some other provision of law" is not defined in the statute. It is appropriate, therefore,

---

[25] See supra note 1.

to examine legislative history surrounding the enactment of ORS 161.200 for clues to that phrase's meaning.

ORS 161.200 was enacted as section 20 of the 1971 revision to the Oregon Criminal Code. The commentary to the Proposed Oregon Criminal Code Section 20 states that it was derived from Model Penal Code Section 3.02, New York Revised Penal Law Section 35.05(2) and proposed but not enacted Michigan Revised Criminal Code Section 605. Subsection (1) of ORS 161.200 is substantially similar to the proposed Michigan statute.[26] Under the proposed

---

[26]The proposed Michigan statute provided:

> "(1) Unless inconsistent with other provisions of this chapter defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when it is necessary as an emergency measure to avoid an

Michigan statute, the defense is available

> imminent public or private injury [which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which] is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.
>
> "(2) The necessity and justifiability of conduct under subsection (1) [may] not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of case arising thereunder. [Whenever evidence relating to the defense of justification under this section is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification.]"

The bracketed language was omitted from the Oregon statute.

"[u]nless inconsistent with other provisions of this chapter defining justifiable use of physical force, or with some other provision of law." (Emphasis added.) Proposed Michigan Revised Criminal Code Section 605(1). The Model Penal Code counterpart permitted the defense if:

> "(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
>
> "(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> "(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Model Penal Code Section 3.02(1) (1962) Official Draft.

The New York statute makes the defense available "[u]nless otherwise limited by the ensuring provisions of this article defining justifiable use of physical

force[.]" New York Penal Law Section 35.05(2).

There is little in the legislative history of ORS 161.200 that helps us to discern what the legislature intended by the broad language "inconsistent * * * with some other provision of law." It is apparent, however, that that language is more restrictive than its New York counterpart. It also is clear, as the majority of the Court of Appeals said, that the phrase "inconsistent * * * with some other provision of law," as used in the Oregon statute, does not "mean[] the same thing as § 3.02(1)(c) of the Model Penal Code. ORS 161.200(1) does not require, as does the Model Penal Code, an express legislative foreclosure of the defense; it requires only that the defense be inconsistent with some other provision of

law." State v. Clowes, supra, 100 Or App at 272.

In City of St. Louis v. Klocker, 637 SW 2d 174 (Mo App 1982), three defendants were charged with trespass after they had entered an abortion clinic, attempted to dissuade patients from having abortions by detailing their physical and psychological dangers, and blocked access to the procedure rooms by sitting in a doorway. At the trial on charges of trespassing, they raised the statutory affirmative defense of necessity. The defendants contended that the injury avoided by their conduct was the "killing of human life" by the abortions of unborn fetuses. The Missouri Court of Appeals ruled as a matter of law that the defense was not available to the defendants. The court stated, inter alia, that the Missouri statute [§ 563.026 RSM 1978] provides that necessity is

available as a defense only if it is not "'inconsistent * * * with some other provision of law.'" Id. at 177. The Missouri court interpreted that language to "simply mean[] that the legislature's decision prevails if and when it makes specific value choices," and that "'competing values which have been foreclosed by deliberate legislative choice are excluded from the general defense of justification[.]'" Id. The court found that the Missouri legislature had made specific value choices in the area of abortion.

We believe that the interpretation given by the Missouri court captures the essence of what the Oregon legislature intended by its conscious choice to include the broad language "inconsistent * * * with some other provision of law" in ORS 161.200(2). The Oregon legislature

made a deliberate value decision when, in 1983, as previously discussed, it repealed the Oregon statutes that restricted a woman's right to terminate her pregnancy and enacted law that assumes abortions will be performed. Here, the actions that defendants sought to prevent were actions permitted under Oregon law. The interests that defendants seek to vindicate are not, therefore, consistent with that legislative decision. The present state of Oregon law is that a decision to terminate a pregnancy is a matter between a pregnant woman and her doctor. Hence, the defense of choice of evils, ORS 161.200, is unavailable to defendants in this case because it is, in the words of the statute, "inconsistent * * * with some other provision of law." ORS 161.200(1).

There is yet another reason why the defense of choice of evils is unavailable

to defendants in this case. Even if the defense were not "inconsistent * * * with some other provision of law," a precondition to the availability of the defense is that the defendants' "conduct [must be] necessary as an emergency measure to avoid an imminent public or private injury." (Emphasis added.) ORS 161.200(1)(a). Here again, neither the statute nor legislative history supplies us with the intended meaning of the statutory terminology "public or private injury." Normally, in the legal sense, a public or private injury, when caused by a human being, presupposes the actionable invasion of some right. City of St. Louis v. Klocker, supra, 637 SW 2d at 176 ("no actionable invasion of rights occurs in legally protected activity.") As previously discussed, Oregon law does not prohibit voluntary and properly performed

termination of pregnancies. Moreover, this court has never held that such a termination of pregnancy constitutes a tort.[27] We believe it is only reasonable to conclude that what is lawful and nontortious is not a "public or private injury," as that language has meaning in the context of ORS 161.200(1)(a). Since termination of pregnancies are legal, nontortious activity under present Oregon law, their occurrence cannot be a "public or private injury." Because none of the terminations of pregnancies, which defendants sought to prevent in this case, is a "public or private injury" under ORS 161.200(1)(a), defendants are

---

[27]Our decisions in Libbee v. Permanente Clinic, 268 Or 258, 518 P2d 636, 520 P2d 361 (1974), and Mallison v. Pomeroy, 205 Or 690, 291 P2d 225 (1955), providing causes of action for injury to or the death of a viable fetus, have not been extended to voluntary and properly performed terminations of pregnancies.

foreclosed from asserting the defense of choice of evils.

The decision of the Court of Appeals is affirmed. The judgment of the Multnomah County District Court is affirmed.